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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MASSACHUSETTS

3 SCANSOFT, INC., )  
4 Plaintiff )  
5 -VS- ) CA No. 04-10353-PBS  
6 VOICE SIGNAL TECHNOLOGIES, INC., et al, ) Pages 1 - 26  
7 Defendants )  
8

9 MOTION HEARING  
10 BEFORE THE HONORABLE PATTI B. SARIS  
11 UNITED STATES DISTRICT JUDGE

12 A P P E A R A N C E S:

13 LISA M. FLEMING, ESQ. and ERIK PAUL BELT, ESQ.,  
14 Bromberg & Sunstein, 125 Summer Street, Boston,  
Massachusetts, 02110-1618, for the Plaintiff.

15 SARAH CHAPIN COLUMBIA, ESQ. and ROBERT S. FRANK, JR.,  
16 ESQ., Choate, Hall & Stewart, 53 State Street, Boston,  
Massachusetts, 02109, for the Defendants.

17  
18 United States District Court  
19 1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
20 May 5, 2006, 10:00 a.m.  
21  
22

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P R O C E E D I N G S

2 THE CLERK: The case of ScanSoft, Incorporated v.  
3 Voice Signal Technologies, et al, Civil Action No. 04-10353,  
4 will now be heard before this Court. Will counsel please  
5 identify themselves for the record.

6 MR. BELT: Thank you. Good morning, your Honor.

7 Eric Belt, and we have Lisa Fleming, Bromberg & Sunstein, for  
8 the plaintiff ScanSoft.

9 MS. COLUMBIA: Good morning, your Honor. Sarah  
10 Columbia and Bob Frank for Voice Signal.

11 THE COURT: Now, as I understand it, the expert is  
12 coming Monday?

13 MS. FLEMING: That's correct, your Honor.

14                   THE COURT: Which is what's creating the crisis  
15 here and the escalating piles of paper that I have been  
16 receiving. As I understand it, he would like to speak with  
17 two independent experts. I read the excerpt. If there's a  
18 question about that, I should talk to him.

I view there as being two questions. One is whether he gets to speak to an independent expert, and the second is what that expert gets to see. I have focused on part one, which is that he gets to speak to an independent expert designated by both sides because he's asked for it. So that would be a modification of what I did because he's asked for it.

1               Part two, which I did not intend to do, is expand  
2 it so that the independent expert gets to look at the entire  
3 source code for Voice Signal. So that is why I'm here today,  
4 to talk about the ramifications of allowing the expert to  
5 talk to -- by which, I mean Dr. Ney -- to talk to one expert  
6 from each side because apparently he feels that that would  
7 facilitate his decision-making. That doesn't mean that the  
8 experts get to see the other side's source code, okay.

9               So, now, to the extent that some of it comes up in  
10 passing in the way he articulates the question, that may be  
11 an unfortunate by-product, and in that sense, I am opening it  
12 up, but not that the independent expert gets to look at the  
13 complete other side's source code.

14               Now, does this clarification help things?

15               MS. COLUMBIA: Yes, your Honor.

16               MS. FLEMING: If I may, your Honor, we do not  
17 believe that it does help things. First, with respect to  
18 whether independent experts should be part of the neutral  
19 expert procedure, there's no dispute about that. Both sides  
20 have said on the record that independent experts should  
21 participate.

22               THE COURT: Right, that's all I thought I was  
23 doing.

24               MS. FLEMING: The motion that we filed, your Honor,  
25 that you did allow was to have our independent expert,

1 Richard Goldhor, to have access to the Voice Signal source  
2 code. And let me explain why --

3 THE COURT: Well, all I meant was access in the  
4 sense that if he asks a question about it, the expert can  
5 answer; not that he gets to sit and read the whole thing.

6 MS. FLEMING: If the neutral expert asks the  
7 independent expert a question about Voice Signal  
8 Technologies' source code, the independent expert is not in a  
9 position today to answer that question.

10 THE COURT: Well, that may be, that may be. And it  
11 may be that we're going to have to carefully craft a way for  
12 Dr. Ney to use the independent expertise from both sides.  
13 That may happen. That's why I allowed it. And to the extent  
14 that he asks a question which gives a window on the voice  
15 code, that may be inevitable, but that doesn't mean -- the  
16 reason I did this whole procedure was not to give both side's  
17 experts full, whole-hog exposure to the source code. If some  
18 comes up, it does, and I'm going to have to trust Dr. Ney on  
19 that. Am I pronouncing that correctly?

20 MS. COLUMBIA: I think it's Ney, your Honor.

21 THE COURT: Ney? I have to write that down. All  
22 right, am I talking to him on the 11th, by the way? Is that  
23 the theory? Because they never called back and confirmed, so  
24 I --

25 MS. FLEMING: The reason we didn't call back is,

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1 Dr. Ney has been in transit since we got the call saying you  
2 were available on the 12th of May, so he has not been in  
3 contact with us.

4 THE COURT: Do I write it in the calendar or not?  
5 That becomes a critical question for me.

6 MS. COLUMBIA: Yes, your Honor. I think he had  
7 asked to speak with you, and we'll confirm his availability,  
8 but I think your availability soon after the May 8 meeting  
9 would be very useful to talk with him.

10 THE COURT: Someone needs to get back to my  
11 secretary, who sort of went through panic mode when I told  
12 her, "Oh, they're all talking about this date," and she said,  
13 "No one's confirmed it with me." So you really need to do  
14 that, or I lose the spot. It's not on the calendar, which is  
15 a very dangerous place for you to be.

16 MS. FLEMING: We'll give her a call and confirm  
17 that it's on your calendar.

18 THE COURT: Or at least have my secretary  
19 tentatively write it in so it's reserved for you.

20 MS. FLEMING: Your Honor, may I address the issue  
21 that you raised with respect to --

22 THE COURT: Yes. I mean, that's why we did this  
23 whole thing.

24 MS. FLEMING: Well, your Honor, I agree, back then  
25 that was why we did it, but things have changed. And the

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1 reason that they've changed is, this neutral expert procedure  
2 we've been working under since the order in December has gone  
3 as far as it can go. It's run its course. We have  
4 designated counsel here for ScanSoft. He is prepared to tell  
5 you, your Honor, that he's taken this as far as he can go.

6 THE COURT: I understand that. You know, attorneys  
7 aren't trained this way. I mean, they have limited  
8 training. I understand. That's why I'm willing to modify it  
9 and allow some independent expert to answer questions.

10 MS. FLEMING: But he can't answer the questions  
11 Dr. Ney wants unless the independent expert has access to  
12 their code. Can I just explain? The reason for that is,  
13 Professor Ney has said on the record that he's uncomfortable  
14 with the amount of source code he has to look at.

15 THE COURT: When I hear from him, maybe I'll modify  
16 it. At this point I'm not willing to turn the whole order on  
17 its head. I thought what I was doing was allowing  
18 independent experts to familiarize themselves with the basic  
19 claims here, and to specify in better detail than counsel was  
20 able to do -- I understand that -- what the claims were, the  
21 alleged trade secrets, the things that you're worried about,  
22 and maybe answer questions that Dr. Ney might have: Well,  
23 what about this? Would you consider that to be X? I'm  
24 making it up because I -- and it may be that he's going to  
25 ask certain questions coming from the code. If he does, he

1 does. And in that sense, your guy will have -- I assume it's  
2 a guy, right?

3 MS. FLEMING: Yes.

4 THE COURT: -- will have access to the source  
5 code. I don't want that to be viewed as any kind of  
6 violation, and that's why I allowed it. But I had not  
7 understood until I read their opposition that you want him to  
8 sit down and read the entire source code.

9 MS. FLEMING: Well, you are correct, your Honor,  
10 that our independent expert will be able to answer all of  
11 Dr. Ney's questions on our own source code. That's fair and  
12 that's true, and that should happen. What Voice Signal has  
13 asked by asking you to reconsider your order and to have  
14 ScanSoft not have access to their source code is, there's no  
15 ability in this case --

16 THE COURT: You know, can I say one thing? You  
17 guys flip me motions and then tell me the meeting is May 8.  
18 It looks like you just both want your respective experts to  
19 be able to go in there and have a meeting with Dr. Ney, which  
20 seems perfectly reasonable to me. When you slip in there  
21 suddenly -- wow, I mean, I'm going through a pile like this  
22 every day you slip in there -- suddenly it's turning the  
23 whole order on its head. You know, that's not what I  
24 intended, and that's why I'm holding the hearing here today.

25 MS. FLEMING: Your Honor, what I'm concerned about

1 is that Monday's --

2 THE COURT: I'm not doing it, I'm not doing it. If  
3 I talk to Dr. Ney on the 12th and I decide to change my mind,  
4 maybe I'll be here. But for the meeting on the 8th, they  
5 should be there to answer questions about their own source  
6 code and about the claims that you're making with respect to  
7 the other guy's source code. And then if he wants to ask  
8 questions, I leave it up to him. Okay, that's where we're  
9 at. If I decide after talking to Dr. Ney that he can't do it  
10 that way, that there's a big gap, maybe I will have to  
11 rethink the whole thing, but this is taking way too long.

12 Both sides have been a little bit involved here in  
13 nitpicking each other to death and not trying to work things  
14 through. Maybe there are a ton of things that are being  
15 worked through that I don't see, and maybe I'm being unfair  
16 here, but I think at this point I am not going to let your  
17 expert read the entire source code for the other side. And I  
18 add to that -- let me just say, are your people here from  
19 Nuance or ScanSoft?

20 MS. FLEMING: No, your Honor.

21 THE COURT: I was horrified by that press release.  
22 Were you involved with that?

23 MS. FLEMING: We knew that the press release  
24 issued.

25 THE COURT: Well, how can you -- you're using this

1 litigation for business purposes. That really is not  
2 kosher.

3 MS. FLEMING: Your Honor, if I may, both sides --

4 THE COURT: Both sides should not do it. I am now  
5 issuing a direct order that no one can use anything about  
6 this case and this procedure to gain a business advantage by  
7 going to the press that way. I mean, the way it looked  
8 was -- maybe from an outsider, but I'm into circumstantial  
9 evidence -- you put that in there, then you send Lehman  
10 Brothers, and then you launch a suit in Texas. That's what  
11 it looks like, that I'm being used as a pawn in business  
12 matters. Now, maybe they're doing the same thing and you  
13 haven't filed it. I'm saying what I've seen that you've  
14 done, and that's extremely troubling to me.

15 MS. FLEMING: Your Honor, if I may, the business  
16 issues are completely separate from this litigation. The  
17 distinct disadvantage in this case is that there's been no  
18 discovery in the case; and every time we get closer to  
19 resolving this on the merits, Voice Signal runs into court  
20 and asks you to put a halt to it.

21 THE COURT: No, I'm not putting a halt to it. This  
22 is moving forward. The independent experts are going to go  
23 to him and do whatever Dr. Ney wants them to do. And if  
24 Dr. Ney feels that there's a gap and he thinks that what I've  
25 asked him to do is not doable, then I will address that.

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1 MS. FLEMING: Okay, I just respectfully suggest  
2 that the meeting on May 8 will not go as far as it could,  
3 your Honor, if we could have the ability to have access to  
4 discovery.

5 THE COURT: It may be. Now, what about this Texas  
6 suit? Is that just the flip side of what we're doing here?  
7 What's going on there? Who brought that suit? Is that your  
8 firm?

9 MR. BELT: No, your Honor.

10 THE COURT: Who's the law firm involved in that?

11 MR. BELT: O'Melveny & Myers in Los Angeles.

12 THE COURT: And have you given them access to  
13 anything we've done here?

14 MR. BELT: No.

15 THE COURT: I want a complete Chinese wall,  
16 complete, and I want you to give me an affidavit saying  
17 there's a complete Chinese wall. I want nothing that's been  
18 learned in this suit to go to that, nothing.

19 Now, I think it's nuts, and I don't know -- who's  
20 the judge in the Eastern District?

21 MS. COLUMBIA: Judge Folsom.

22 THE COURT: I think it is forum shopping. I think  
23 it has nothing to do about Massachusetts. It's just the  
24 juries tend to return great verdicts in the Eastern District,  
25 and they have good judges that know the law. I don't know

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1 that it's hiding. It's well known. Everyone is flocking to  
2 the Eastern District of Texas because, A, the judges know the  
3 law, and, B, the juries are very generous.

4 (Discussion off the record.)

5 MS. COLUMBIA: I was just saying, your Honor, we  
6 have filed a motion under 1404(a) in the Texas action asking  
7 Judge Folsom to transfer venue to this court.

8 THE COURT: Fine, and maybe he will and maybe he  
9 won't. I'm not going to enjoin him. That's what the judges  
10 do. I'm not going to enjoin the prosecution of a suit down  
11 there. This happens. It's actually common, not uncommon.  
12 So I understand. And I am very familiar with the facts and  
13 circumstances of this case, and I am concerned about it. But  
14 at the very least, the following three things I'm ordering:  
15 I'm denying the motion to enjoin the Texas suit, but I am  
16 more than willing to take the suit if the judge down there  
17 wants to transfer it up here. But I do not make any finding  
18 that it's for a nefarious purpose of trying to funnel  
19 information from this suit down to the Texas suit. I don't  
20 have a basis for that, and I'm not going to do that right  
21 now. I think it's what you hear in these patent conferences,  
22 that it's a hot patent court, okay.

23 Two, I am giving a direct order that neither side  
24 shall go to the press and comment on this litigation. I was  
25 deeply troubled by what happened in that press release. And

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1 you may be right, there was one from the other side. I don't  
2 want this being used to depress other -- you're making a  
3 representation to me that Voice Signal issued a press release  
4 regarding some of my procedural orders here?

5 MR. BELT: There was a press release the next day  
6 from Voice Signal on Saturday in the Boston Globe.

7 MS. COLUMBIA: I'm unaware of it, your Honor. I  
8 don't doubt Mr. Belt.

9 THE COURT: All right, I want you both to  
10 communicate this to your clients, and I give you a direct  
11 order that neither side shall comment to the press about the  
12 proceedings in this -- I don't want to make it too broad.  
13 I'm talking only about the back-and-forth involving this  
14 expert neutral procedure. I mean, I'm not saying you can't  
15 issue a press release if you start a new suit or something.  
16 I'm talking about, I don't want this procedure being used for  
17 business and competitive advantage, and it's just wrong.

18 Second, there will be a complete and absolute  
19 Chinese wall between your law firm and O'Melveny. I don't  
20 want lawyers talking about the case together, and I don't  
21 want any information from this suit going to that suit.

22 Now, if in fact it all comes up here, I'm not  
23 against -- if I'm in control of what's happening so that I  
24 think that it's just a question of lessening the expense of  
25 discovery, I'm going to probably lift that Chinese wall. But

1 I can't be sure about what's happening, and they've made  
2 certain allegations, and I want to make sure -- while I'm  
3 sure counsel is playing aboveboard, I was really troubled by  
4 the sequence of events of a press release and then an  
5 immediate visit by Lehman Brothers and then a lawsuit in  
6 Texas. That's troubling.

7 MR. BELT: I will just say, your Honor, the lawsuit  
8 in Texas is different patents, and it's not the trade secrets  
9 here, and it's not the '966 patent.

10 THE COURT: I wouldn't know. I am simply saying,  
11 that sequence of what happened in March is really a problem  
12 for me because it makes me think that you're using me as a  
13 pawn for business advantage. I wasn't born yesterday. I  
14 know this happens.

15 MR. BELT: Yes, I hear what you're saying, your  
16 Honor. I just want to also make sure that the record  
17 understands that I would disagree with that. We're certainly  
18 not doing that, and this is really a legitimate case to  
19 protect our intellectual property.

20 THE COURT: Oh, it may be. I've never said this  
21 case. My instant case in front of me may well be. I don't  
22 know. That's why I have this expert procedure. It's been  
23 elaborate, it's been expensive, it's been time-consuming, and  
24 I want it to be over. So I would prefer if you conferred and  
25 tried to work things out.

1           Why couldn't you both just agree on each other's  
2 independent experts? Why did it have to come to me? And  
3 then you could have narrowly defined the issue and focused  
4 it. You're moving for me to reconsider my order that they  
5 get full access to the source code. You all raise a big  
6 emergency, he's coming in May 8, which is why I didn't wait  
7 14 days, which would have been nuts because it was after  
8 May 8.

9           MR. BELT: Your Honor, well, first of all, the  
10 timing of our motion was because we got an E-mail from  
11 Dr. Ney saying, "I'd like independent experts there." And as  
12 far as independent experts go, we do agree to their  
13 independent expert, Dr. Wooters; he can be there. What we  
14 don't agree to is for VST to bring its fact witnesses, which  
15 are the employees of VST.

16           THE COURT: I'm giving you one independent expert  
17 apiece who will sign onto whatever the protective orders have  
18 been. That's what I'm giving you.

19           MR. BELT: And I think that's reasonable.

20           THE COURT: And if that's inadequate, I will talk  
21 to Dr. Ney on the 11th and see what we can find out. I don't  
22 know how else to do this because when -- was it you who gave  
23 me the ream of materials? I can't understand it. I thought  
24 Voice Signal's suggestion was a perfectly valid one. It  
25 turns out, even your expert lawyers don't understand it, so

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1 that's why we need the independent experts and Dr. Ney. So I  
2 can't figure out whether there's enough there or whether this  
3 is just a sneaky way of getting competitive information. I  
4 don't know, don't know. I don't know another way of doing  
5 this. This is expensive, this is time-consuming, and I want  
6 it to be over so that we can either move on with this or end  
7 it.

8 MS. COLUMBIA: There is one more issue, your Honor,  
9 if I may.

10 THE COURT: Yes.

11 MS. COLUMBIA: On our side, for the independent  
12 expert, Mr. Wooters is not available.

13 THE COURT: On the 8th?

14 MS. COLUMBIA: On the 8th. So we had retained a  
15 gentleman named Dr. Byrne, who's in Cambridge in the U.K. We  
16 brought him over here before the last meeting with Dr. Ney  
17 and got him up to speed because, obviously, the only people  
18 who really know the Voice Signal code are the people at  
19 Voice Signal. So we spent time with Dr. Byrne, got him  
20 familiar with the Voice Signal code, had him review the  
21 first-year code produced to Dr. Ney; brought him to the  
22 March 24 meeting with Dr. Ney thinking he might be able to be  
23 useful to answer Dr. Ney's questions. ScanSoft objected.  
24 Rather than take time while Dr. Ney was here to fight that  
25 out with him, we put Dr. Byrne in a conference room to read

1 the paper for the day, and we did what we could do without  
2 him.

3 THE COURT: Do you have a problem with Byrne?

4 MR. BELT: Yes, we do, your Honor.

5 THE COURT: Why?

6 MR. BELT: He wrote part of the code. His name is  
7 all over the first-year documents. He's a fact witness --

8 THE COURT: He wrote part of their code?

9 MR. BELT: Their code he wrote.

10 THE COURT: So what?

11 MR. BELT: Because it then becomes a fact  
12 investigation, your Honor. And if he's going to talk about  
13 the development of the code, we want to be able to  
14 cross-examine him and --

15 THE COURT: Excuse me. Overruled. You can have  
16 him there. Just I want to get this over with, over with.

17 MR. BELT: Also he's a friend of Dr. Ney's.

18 THE COURT: Overruled. He's not a friend. He  
19 knows him at a conference. They all know each other. We  
20 went through this last time. You each get an independent  
21 expert. They get to talk to Dr. Ney.

22 MR. BELT: He is joined at the hips -- I'm sorry,  
23 your Honor, but he is joined at the hips with VST. His name  
24 is on --

25 THE COURT: Does he have a financial interest?

1                   MR. BELT: Yes. He's a paid consultant and has  
2 been before this case.

3                   THE COURT: Does he have a stock interest?

4                   MS. COLUMBIA: No. He was a part-time consultant  
5 in 2001 and early 2002. He has no financial interest  
6 whatsoever in the company.

7                   THE COURT: Overruled. So I want it to be over,  
8 and I want to talk to Dr. Ney, and if he feels that he can't  
9 do it, then I'm going to have to go back to your request.

10                  MR. BELT: Okay, because we do have the concern  
11 about Dr. Byrne. Because he wrote part of the code, we would  
12 ask that in any conversation that Dr. Byrne has with Dr. Ney,  
13 that we are allowed to be there. In other words, that  
14 section does not get to be --

15                  THE COURT: I leave that procedure up to Dr. Ney.  
16 I need to get through the discovery. Everything is a pitched  
17 battle. I get -- what adjective? -- overwrought motions from  
18 you. I get a sequence of events that I found so troubling,  
19 which basically does cast a cloud over what you're doing. It  
20 does. It makes it seem like you're just trying to buy the  
21 company and you're trying to whack them into shape. If you  
22 want to buy it, fine, it's a good way to settle. I often  
23 have patent cases that settle. But I don't want to be used  
24 as part of it to depress the stock value.

25                  MR. BELT: I hear you, your Honor, and I will say,

1 this case was brought to enforce our intellectual property,  
2 and in fact it was brought long before. I mean, it's just  
3 not connected.

4 THE COURT: I believe that initially speaking.

5 MS. COLUMBIA: It was connected with the last  
6 attempt to acquire the company.

7 THE COURT: Excuse me. I'm not sure I agree with  
8 that. I understand why they're worried: Their top people go  
9 over and work for your people. I understand why that raises  
10 a concern if they think that there are similar products and  
11 that it will be using source code. I am not making a finding  
12 as far as the original filing. But I am, you know, like the  
13 footprints in the snow, circumstantial evidence. When I  
14 issue a ruling and I see a one-sided press release, and then  
15 I see Lehman Brothers go in, and then when I see that fails,  
16 I see a suit in Texas all within two weeks, what inference  
17 can I draw?

18 MS. FLEMING: Well, all the while, your Honor, we  
19 still don't have discovery in the case, and two years has  
20 past. We still don't even know if we have the full source  
21 code from Voice Signal.

22 THE COURT: You know what? I've done what I can  
23 do. You both trust Dr. Ney, and so do I.

24 Now, here's the big issue: I don't know what I can  
25 accomplish on the phone on the 11th. I don't know enough

1 about -- I don't remember enough for starters about the case,  
2 and I'm viewing that as a preliminary discussion with him.  
3 And it may be that -- I don't know if there's another --  
4 maybe you can get on the phone with Robert and maybe have a  
5 more fulsome time with him in person.

6 MS. COLUMBIA: We can discuss that with him on  
7 Monday.

8 THE COURT: What would be useful? Because I'm not  
9 sure, verbally, he may just simply be asking you what format  
10 it makes sense for him to report to me.

11 MS. COLUMBIA: I will say, Judge, his English is as  
12 good as mine, so I don't think you'll have any language  
13 difficulties.

14 THE COURT: Well, that's actually very good to  
15 know.

16 MS. COLUMBIA: Sometimes on the telephone, language  
17 difficulties can be magnified, and I just wanted to let you  
18 know that his English is perfect.

19 THE COURT: For me, the bigger issue is going to be  
20 understanding it well enough, because you've both made the  
21 point, and I think it's a hundred percent fair, that I make  
22 the decision and not he, and that he not be the one to be the  
23 ultimate decision-maker. And so I just need to -- they're  
24 making fun of me, but -- you know the President's recent  
25 statement, "I'm the decider"? It's become well known in my

1 office.

2 So I will be the decider, but I need to understand  
3 it, and I don't know that I can do that over the telephone.  
4 And my thought would be some sort of a written report, and  
5 then having him -- this is my thought -- come over and  
6 explain it to me if I don't understand it.

7 MS. COLUMBIA: I'm sure that that can be arranged,  
8 your Honor.

9 THE COURT: That's how I've thought about it. And  
10 then all I do at that point is let it go forward.

11 Now, I have another issue with you. I understand  
12 that Judge Alexander disqualified Goodwin Procter.

13 MS. FLEMING: Yes, and there were objections  
14 filed.

15 THE COURT: So has she issued a written opinion  
16 yet?

17 MR. BELT: I don't think I've seen that.

18 MS. FLEMING: I don't think there was an opinion.

19 MR. BELT: She did say in her ruling that a  
20 memorandum would be coming.

21 THE COURT: All right, and so you just want to be  
22 able to -- will you be taking the oar on that, or will  
23 Goodwin Procter?

24 MS. FLEMING: Goodwin Procter, your Honor.

25 THE COURT: You know, actually, Judge Alexander and

1 I talked because we went back and forth on whether it was  
2 more appropriately addressed as a report and recommendation  
3 or whether it was a nondispositive motion. I thought that  
4 was actually a little neat threshold issue, so -- I mean, I  
5 actually didn't for sure know the answer to that, but it may  
6 be nondispositive. And so some help when that memo comes out  
7 might be on whether it's an abuse-of-discretion standard or  
8 whether it's a de novo. She and I batted that around.  
9 That's just one of those neat little things that I get  
10 interested in on how I think about it. But I do know she had  
11 an evidentiary hearing, right?

12 MR. BELT: She did.

13 THE COURT: So at least with respect to the  
14 findings of fact, that's probably going to be the record. So  
15 then we can address that then.

16 MS. COLUMBIA: Your Honor, may I raise two  
17 additional things before we go?

18 THE COURT: Yes.

19 MS. COLUMBIA: One is, you said at the beginning  
20 that you were going to require some sort of affidavit from  
21 Bromberg & Sunstein with respect to communications with the  
22 O'Melveny firm. The piece of the time line that comes before  
23 the press release is, of course, our production of the source  
24 code. And I understand what your rulings are, but we are  
25 concerned about the timing of the Texas case vis-a-vis our

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1 production of the source code.

2 THE COURT: Oh. When do you think you can get to  
3 them and just guarantee that nothing has been sent from the  
4 company?

5 MS. FLEMING: We have a declaration from  
6 Mr. Lawrence, who is the only person who has had access to  
7 Voice Signal's source code and source code documentation. We  
8 have that, and we're prepared to submit that today.

9 THE COURT: All right. Well, have I got it  
10 already?

11 MS. FLEMING: It's right here. No. Mr. Lawrence  
12 signed it this morning.

13 THE COURT: All right.

14 MS. FLEMING: But I do want to say for the record,  
15 your Honor, there is not a shred of evidence in that motion  
16 that suggests that Bromberg & Sunstein has done anything  
17 outside of the provisions of the protective order or the  
18 neutral expert procedure, and to suggest otherwise, your  
19 Honor, quite frankly, is a Rule 11 issue from my perspective.

20 THE COURT: As long as I've got verification here  
21 that nothing's happened. And could you file an affidavit in  
22 the next week or so saying that you've sort of set up a  
23 Chinese wall between yourself and O'Melveny?

24 MS. FLEMING: Yes, we will do that, your Honor.

25 MS. COLUMBIA: Your Honor, if I could, the second

1 issue just relates to Dr. Byrne.

2 THE COURT: So have you seen a copy of this?

3 MS. COLUMBIA: I have not, your Honor.

4 MR. BELT: We just got their motion last night.

5 THE COURT: I understand, I understand. Do you all  
6 confer before you file these things so you can narrow --

7 MR. BELT: We do on our side.

8 THE COURT: Why don't you confer.

9 MS. COLUMBIA: We do, your Honor, and generally  
10 speaking, it's not fruitful, in both directions. And as your  
11 Honor correctly observes, there are things that we work out  
12 that don't get to you, but on the things that do get to you,  
13 we're very rarely able to limit the disputes.

14 THE COURT: Well, have you given them a copy of  
15 this now, this affidavit?

16 MS. COLUMBIA: I was just handed it, your Honor.

17 THE COURT: Well, why don't you sit down for a  
18 second and read it.

19 (Pause.)

20 MS. FLEMING: Your Honor, just in the interest of  
21 full disclosure, let me be clear that Mr. Lawrence's  
22 affidavit does say that we did give the source code to the  
23 independent expert yesterday, or the 3rd, whatever the 3rd  
24 was, and that was based on your ruling. He hasn't done  
25 anything --

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1 THE COURT: Did you know what was being challenged?

2 MS. FLEMING: Well, they didn't file until 4:00.

3 MS. COLUMBIA: I wrote counsel a letter on the 2nd  
4 letting counsel know that we were moving to stay and  
5 asking --

6 THE COURT: Why didn't you tell me that while we  
7 were having the discussion -- stop. Why didn't you tell me  
8 that when I just did the order? We just had a 15-minute  
9 discussion about it. I didn't know you had already turned it  
10 over to Goldhor and he hasn't done anything with it yet.

11 MS. FLEMING: He hasn't done anything with it.

12 THE COURT: I want an affidavit from him saying he  
13 hasn't looked at it.

14 MS. FLEMING: That's exactly what we'll do.

15 THE COURT: Fine, all right. You know, you should  
16 have told me that rather than sitting on this thing. I want  
17 to know these things.

18 MS. FLEMING: Your Honor, we're here today because  
19 they filed this motion last night.

20 THE COURT: I know, but we had this discussion  
21 20 minutes ago. Twenty minutes ago we had this whole  
22 discussion, and you didn't breathe a word that he already had  
23 it. I didn't know that.

24 MS. FLEMING: Your Honor, he has not done anything  
25 with it.

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1                 THE COURT: Maybe, but just tell me it. I just  
2 want to know. I want to believe that you're telling me  
3 everything. And so when we had this whole discussion about  
4 it 15, 20 minutes ago about how I only intended access to the  
5 extent that Dr. Ney thought it was appropriate to have  
6 access, you should have said, "Oh, you know, by the way,  
7 we've already relied on this. What should I do about it?"

8                 MS. FLEMING: Well, your Honor, I would immediately  
9 fix it. Obviously your order says --

10                 THE COURT: Tell me.

11                 MS. FLEMING: Understood, your Honor.

12                 THE COURT: Just tell me.

13                 MS. FLEMING: Understood. I just want the Court to  
14 be clear that nothing has been done with it other than the  
15 delivery of it.

16                 THE COURT: Fine. I don't want him to look at it.  
17 I want him to return it.

18                 MS. FLEMING: Understood.

19                 THE COURT: And to the extent he has looked at it,  
20 I want to know the extent to which he's looked at it.

21                 MS. FLEMING: And we'll submit an affidavit to that  
22 effect.

23                 THE COURT: And I don't want him to tell a soul  
24 about it if he's looked at it.

25                 MS. FLEMING: Understood.

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1           THE COURT: And I may disqualify him if he's looked  
2 at it. So does anyone know if he's looked at it? Is it your  
3 impression he's not looked at it?

4           MS. FLEMING: It's my impression he has not looked  
5 at it, your Honor.

6           THE COURT: Who's here right now? Who's worked  
7 with him?

8           MS. FLEMING: Mr. Lawrence is here.

9           THE COURT: Mr. Lawrence, has he looked at it?

10          MR. LAWRENCE: Not to my knowledge.

11          THE COURT: All right, get on the phone as soon as  
12 you leave here, and I want an affidavit that he hasn't. Who  
13 are you, this woman back there?

14          MR. LAWRENCE: That phone call has already been  
15 made. We told him, "Don't do anything."

16          THE COURT: Perfect, okay.

17          MS. FLEMING: Thank you, your Honor.

18          THE CLERK: Court is in recess.

19          (Adjourned, 10:35 a.m.)

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1 C E R T I F I C A T E  
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3

4 UNITED STATES DISTRICT COURT )  
5 DISTRICT OF MASSACHUSETTS ) ss.  
6 CITY OF BOSTON )  
7

8 I, Lee A. Marzilli, Official Federal Court  
9 Reporter, do hereby certify that the foregoing transcript,  
10 Pages 1 through 26 inclusive, was recorded by me  
11 stenographically at the time and place aforesaid in Civil  
12 Action No. 04-10353-PBS, ScanSoft, Inc. Vs. Voice Signal  
13 Technologies, Inc., et al, and thereafter by me reduced to  
14 typewriting and is a true and accurate record of the  
15 proceedings.

16 In witness whereof I have hereunto set my hand this  
17 5th day of May, 2006.

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LEE A. MARZILLI, CRR

24 OFFICIAL FEDERAL COURT REPORTER  
25